

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA**

CHARLESTON DIVISION

VERONIA B. STRICKLAND, et al.,

Plaintiffs,

v.

CIVIL ACTION NO. 2:08-cv-01039

GARY PERDUE, et al.,

Defendants.

MEMORANDUM OPINION AND ORDER

Pending before the court is the plaintiffs' Motion for Entry of Default by Clerk against Gary Perdue [Docket 70]. The plaintiffs assert that while Perdue has appeared and defended against this lawsuit in his official capacities, he has failed to appear and plead in his individual capacity. This motion is **DENIED**.

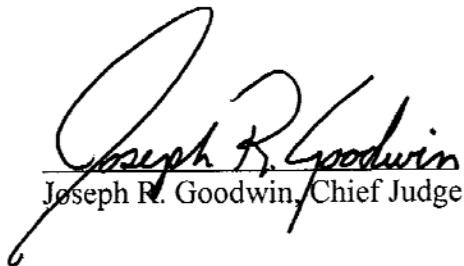
Federal Rule of Civil Procedure 55(a) provides, "When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise, the clerk must enter the party's default." Here, Perdue was served with service of process on September 9, 2008. The plaintiffs contend that although Perdue has appeared and responded in his official capacities as a City of Montgomery police officer and the Smithers Chief of Police, he has not done so in his individual capacity.

The plaintiffs' attempt to exploit the legal fiction between Perdue's official and individual capacities lacks merit. They have not identified a single case where a default was entered against a defendant who, although he appeared in his official capacity, failed to do so individually. Perdue

has meaningfully participated in this litigation. He has engaged in pretrial discovery, has been deposed, and has even filed for summary judgment. While Perdue's lawyers may have neglected to file an answer for him in his individual capacity, to say that he has failed to "otherwise defend" distorts the procedural facts of this case.

Because Perdue has meaningfully participated in this litigation, he has "otherwise defend[ed]" against this lawsuit, and the Motion for Entry of Default is **DENIED**. The court **DIRECTS** the Clerk to send a copy of this Order to counsel of record and any unrepresented party.

ENTER: October 15, 2009



Joseph R. Goodwin, Chief Judge